

DOCKET FILE COPY ORIGINAL

RECEIVED

SEP 19 2001

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC MAIL ROOM

In re Applications of) MM Docket No. 88-577 /
LIBERTY PRODUCTIONS,)
A LIMITED PARTNERSHIP) File No. BPH-19870831MI
Et. Al.)
For Construction Permit for)
New FM Channel 243C3)
Biltmore Forest, North Carolina)

To: The Commission

OPPOSITION TO
PETITION FOR RECONSIDERATION

Liberty Productions, a Limited Partnership ("Liberty") by counsel herewith submits its opposition to the Petition for Reconsideration, filed by Soerenson Southeast Radio, LLC, ("Petitioner") on September 5, 2001 in the above referenced proceeding. In support whereof the following is shown:

1. Petitioner seeks reconsideration of a public notice (Report No. 45043), released by the Commission on August 7, 2001. As will be demonstrated, the petition is procedurally defective, entirely without merit, replete with misrepresentation and utterly frivolous.

2. Petitioner seeks reconsideration of the issuance of a construction permit to Liberty by the Mass Media Bureau on July 9, 2001, which was reported in Public Notice Report No. 45043, released August 7, 2001. The construction permit was issued in

No. of Copies rec'd 014
List ABCDE

response to the Commission's Memorandum Opinion and Order (FCC 01-129), released May 25, 2001, which accepted a November 10, 1999 amendment to and granted Liberty's above referenced application. Petitioner did not seek reconsideration either of the acceptance of the amendment or of the grant of the application. Inasmuch as the Bureau's action, issuing a construction permit, merely implemented the Commission's Memorandum Opinion and Order, it does not constitute an action which is subject to reconsideration in its own right, where Petitioner has failed to seek reconsideration of the Memorandum Opinion and Order. Having failed to timely seek reconsideration of the the acceptance of the amendment and grant of Liberty's application, Petitioner has waived its right to seek reconsideration. ¹/ Accordingly, insofar as Petitioner seeks reconsideration of the issuance of a construction permit, pursuant to the grant of an application with respect to which it has failed to preserve the right to review, its petition is procedurally defective and must be dismissed.

3. To the extent that the petition may be read as a request for reconsideration of the grant of Liberty's application, as amended, it is untimely in the extreme. Petitioner has advanced no showing that it was unable to file a petition for

1. Pursuant to Section 1.103 of the Commission's Rules, the Memorandum Opinion and Order was effective on May 25, 2001. Commission orders are effective upon the date of release, unless the order on its face provides otherwise, which was not the case in this instance. Even where an alternate effective date is specified, the order is deemed final for purposes of seeking reconsideration as of the date of public notice. 47 CFR 1.103(b).

reconsideration within 30 days of the release of the Memorandum Opinion and Order, as required by the Rules. While Petitioner feigns confusion regarding the Memorandum Opinion and Order on the basis that it erroneously referred to the facilities at issue as Class A facilities, counsel for Petitioner had no difficulty filing a timely petition for reconsideration on behalf of another client, which professed similar confusion. ²/ Furthermore, as discussed below, Petitioner had actual knowledge through its former counsel, well before the deadline for seeking reconsideration, that the grant to Liberty involved Class C3 facilities.

4. While Petitioner repeatedly asserts that it should be excused because it lacked notice of that Liberty's application specified C3 facilities, its contention is without merit and must be rejected. As an initial matter, Petitioner did in fact have actual knowledge that Liberty's application, as granted, specified Class C3 facilities. As reflected in the attached statement of Stephen T. Yelverton, counsel for Willsyr Communications Limited, he was contacted by Petitioner's former counsel, John Garziglia ³/ in late May or early June of this year. Mr. Garziglia discussed with Mr. Yelverton the Class C3 facilities that had been granted to Liberty and Mr. Garziglia

2. See: Petition for Reconsideration and/or Clarification, filed June 13, 2001, by Sutton Radiocasting Corporation.

3. Mr. Garziglia is listed as the contact person for communications regarding an amendment to Petitioner's pending application for construction permit (File No. BPH-20010301ABB), which was filed May 11, 2001.

inquired whether Mr. Yelverton's client might be interested in challenging the grant of C3 facilities to Liberty, indicating that he represented an existing station with which the C3 facilities at Biltmore Forest were in conflict. Thus, contrary to Petitioner's representation that it only recently learned of the C3 facilities at Biltmore Forest, it did in fact have, through its former counsel, actual knowledge well before the deadline for seeking reconsideration of the Memorandum Opinion and Order. ^{4/}

5. Even had Petitioner lacked actual knowledge that Liberty's application, as granted, specified Class C3 facilities, it remains without excuse. While Petitioner complains that the Commission's database was not up to date, it is well known among FCC practitioners (both attorneys and technical consultants) that the database is often unreliable and that appropriate diligence must be exercised in using it. However, it is readily apparent from a review of the 1999 application of Chase Broadcasting Inc (attached to the petition), as well as Petitioner's pending application (File No. BPH-20010301AAB), that neither of those parties exercised reasonable diligence in preparing their applications. In that regard it is noted in both cases that, while the applicants devoted significant effort to protecting a nonexistent construction permit for a long ago terminated joint

4. Petitioner also misrepresents the facts when it asserts (at Note 7) "Liberty's 1999 amendment did not even appear in any of the FCC's databases, or ANY engineering database, until a few weeks ago." The amendment appeared in the FCC's database at least as early as April, 2001.

interim operation, they failed to demonstrate protection to three of the then pending applications for Biltmore Forest, North Carolina (BPH-870831MI; (BPH-870831MJ; (BPH-870831ML), including Liberty's application. (See attached Declaration of Timothy L. Warner) Accordingly, given this lack of diligence, Petitioner may not be heard to complain of lack of notice. Furthermore, Liberty's amendment has been on file and available for public inspection since November, 1999. ⁵/

6. To the extent that Petitioner argues that the Memorandum Opinion and Order's silence as to the one-step upgrade and repeated references to the frequency at issue as Channel 243A evidence an intent not to accept the one-step upgrade, its arguments are unpersuasive. The Commission accepted Liberty's amendment without qualification. Likewise, it granted Liberty's application, as amended, without qualification insofar as the November 10, 1999 amendment is concerned. Accordingly, in the absence of any limitation or qualification the Commission must be deemed to have accepted the amendment, as filed, in its entirety, including the one-step upgrade. Furthermore, inasmuch as the amendment contained no proposal for class A facilities at the new transmitter site, it could not have been accepted or granted as a class A proposal. Thus, if Petitioner wished to seek

5. It should be noted that no public notice was given of the filing of Chase Broadcasting, Inc.'s July 27, 1999 application for construction permit until November 18, 1999 and that the specified facilities had not been entered into the engineering database as of December, 1999. (See attached Declaration of Timothy L. Warner)

reconsideration, it was required to do so within 30 days of the release of the Memorandum Opinion and Order, which accepted the November, 1999 amendment and granted Liberty's application.

It could not wait until a construction permit was issued and then seek reconsideration based on a claim that the Memorandum Opinion and Order should be "reinterpreted".

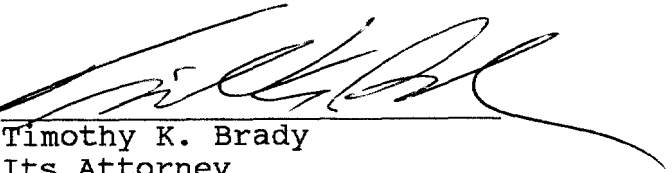
7. Even had Petitioner timely sought reconsideration, its petition would have to be denied, because it is entirely lacking in merit. Petitioner's substantive argument is that Liberty's November, 1999 amendment was in conflict with Chase Broadcasting, Inc.'s previously filed application for construction permit (File No. BPH-19990727AAA). However, as Petitioner readily acknowledges, that application was dismissed at the request of the applicant in 2000. Petitioner has not shown that Liberty's amendment was in conflict with any previously filed application at the time it was accepted by the Commission. Petitioner's claim that the dismissal of Chase Broadcasting, Inc.'s application in 2000 is irrelevant is entirely specious and represents a strained and erroneous reading of Section 73.3573 of the Rules.

8. Furthermore, as has been noted, the dismissed application upon which Petitioner relies (File No. BPH-19990727AAA) failed to demonstrate protection to three of the then pending applications for Biltmore Forest, North Carolina, including Liberty's application. (See attached Declaration of Timothy L. Warner) Accordingly, it was defective and erroneously accepted for filing.

WHEREFORE, premises considered, the Petition for
Reconsideration should be DISMISSED, as procedurally defective,
or alternatively, if considered on its merits, should be DENIED.

Respectfully Submitted

LIBERTY PRODUCTIONS,
A LIMITED PARTNERSHIP

By: 
Timothy K. Brady
Its Attorney

P.O. Box 71309
Newnan, GA 30271-1309
770-252-2620

September 19, 2001

Yelverton Law Firm, P.L.L.C.
601 Pennsylvania Ave., N.W., South Tower, Suite 900
Washington, D.C. 20004
www.YelvertonLaw.com

202-329-4200

202-478-5230 (fax)

September 17, 2001

To: Timothy Brady, Esq.

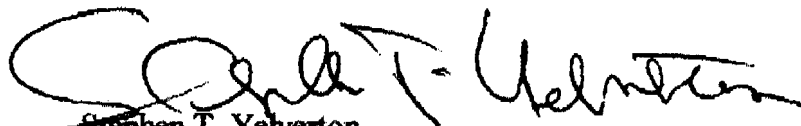
Re: Biltmore Forest C3

Shortly after the FCC issued its decision on May 25th, 2001, in the Biltmore Forest proceeding, I received a telephone call from John Garziglia. To the best of my recollection, the call was in early June. I have known John for almost 20 years. We worked together at the FCC in the early 1980's.

I represent Willsyr Communications in the Biltmore Forest proceeding and John asked me what my client's position would be on appeal. I told him that Willsyr would challenge the grant to Liberty at the U.S. Court of Appeals. He then asked me if Willsyr would oppose a grant to Liberty as a Class C3 and file a petition for reconsideration at the FCC. I told him no, because a Class C3 is in the best interests of Willsyr and all the competing applicants in Biltmore Forest.

I then asked John what his interest was in the Biltmore Forest proceeding. He said that he represented an existing station client that would be in conflict with a Class C3 upgrade in Biltmore Forest. We then chatted a few more minutes about the length and complexity of the Biltmore Forest proceeding and how it might play out.

The foregoing is true and correct to the best of my knowledge and belief.


Stephen T. Yelverton

Declaration

Franklin Application Not in Database or on Public Notice

WNCC-FM¹, Franklin, North Carolina, filed an application for modified facilities, file number BPH-19990727AAA, on 27 July 1999. The Franklin application did not appear in the Federal Communications Commission's database prior to 31 December 1999, the last date that the database in use at that time was officially listed as a usable database. The application did not appear in the Commission's replacement database, the CDBS, until it was dismissed at the applicant's request in May 2000.

Franklin Application Failed to Demonstrate Protection

The application for modified facilities for WNCC-FM, file number BPH-19990727AAA, includes as Exhibit #1 a showing of protection to other facilities and proposals. For Biltmore Forest, the showing of protection is limited to three entities and four applications:

WZLS.A Orion Communications, BMPH-930824IF

WZRQ.C, BPHI-950707MD, and WZRQ.A, BMPHI-961218IA, interim operations which were authorized at two separate sites

AP243 Biltmore Forest Broadcasting FM, BPH-870831MK, shown as dismissed.

There is no demonstration of protection to the other applications which were then pending for Biltmore Forest and which remained pending until May 2001.


¹ WNCC-FM was then authorized with the call sign WRFR.

Declaration

I declare, under penalty of perjury, that I am a technical consultant to broadcasting and other communications systems, that I have over twenty-five years of experience in the engineering of broadcast and other communications systems, that I am familiar with the Federal Communications Commission's Rules found in the Code of Federal Regulations Title 47, that I am a Professional Engineer registered in North Carolina, that I have prepared or supervised the above information for Liberty Productions, A Limited Partnership, and that all of the facts therein, except for facts of which the Federal Communications Commission may take official notice, are true to the best of my knowledge and belief.

Timothy L. Warner, P.E.
87 North Liberty Street
Asheville, North Carolina 28801
(828) 258-1238
17 September 2001

CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that I have this  day of September, 2001, served a copy of the foregoing Opposition to Petition for Reconsideration by First Class mail (except where noted otherwise), postage prepaid upon the following:

Robert L. Thompson, Esq.
Thiemann, Aitken & Vohra, LLC
908 King Street, Suite 300
Alexandria, VA 22314
(Counsel for Sorenson Southeast Radio, LLC)

John Riffer, Esq.**
Associate General Counsel
FCC
445 12th Street, SW
Washington, DC 20554

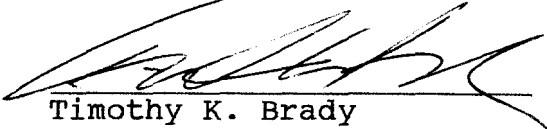
James W. Shook, Esq.**
Enforcement Bureau
FCC
445 12th Street, SW
Washington, DC 20554

Donald J. Evans, Esq.
Fletcher, Heald & Hildreth
1300 N. 17th Street, 11th Floor
Arlington, VA 22209
(Counsel for Biltmore Forest
Broadcasting FM, Inc.)

Stephen T. Yelverton, Esq.
601 Pennsylvania Avenue, NW
Suite 900 South
Washington, DC 20005
(Counsel for Willsyr Communications
Limited Partnership)

Steven C. Leckar, Esq.
Butera & Andrews
1301 Pennsylvania Avenue, NW
Suite 500
Washington, DC 20004
(Counsel for Orion Communications Limited)

** By overnight courier in lieu of mail


Timothy K. Brady